In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI A/K/A FRANK FOTI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The first question presented by the petition is whether denial of an application to suspend the deportation of an alien concededly deportable is a "final order of deportation" directly reviewable by a court of appeals under Section 106 of the Immigration and Nationality Act. 75 Stat. 651, 8 U.S.C. (Supp. III) 1105a. On rehearing *in banc*, the court below, four judges dissenting, held it was not. The Ninth Circuit agrees. *Peter Holz* v. *Immigration and Naturalization Service*, November 1, 1962 (C.A. 9) (appeal from denial of application to withhold deportation under § 243(h) because alien would be subject to physical persecution). *Per contra*, as the Second and Ninth Circuits expressly recognize, the Seventh Circuit holds that denial of discretionary remedial relief is directly

reviewable by the court of appeals. *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7) (appeal from denial of application to withhold deportation under § 243(h)). See also *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), petition for certiorari pending, No. 434 (appeal from denial of first preference immigration visa under § 203(a)(1)(A)).* In view of the significant volume of litigation by deportable aliens contesting orders denying requests for discretionary relief, it is important to the government, as to the aliens, that the conflict in decisions as to the proper forum for review be authoritatively resolved. Accordingly, the United States agrees that certiorari should be granted as to the first question presented by the petition.

2. In our view, however, this Court should not now undertake direct review of the merits. Once it is determined whether the court of appeals or the district court has jurisdiction of these proceedings, petitioner may seek initial review in the proper forum. The United States accordingly opposes the granting of the petition for certiorari as to the second question.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1962.

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* The petition for a writ of certiorari in the *Roumeliotis* case, seeking only a stay of deportation pending action on a private bill, does not raise any question as to the denial of the first preference visa. Accordingly, the government has expressed the view that the case does not appropriately present the jurisdictional issue for resolution.

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